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DEBATING "BEYOND HUMAN RIGHTS" SYMPOSIUM

## Investors' Rights Short of Human Rights in a Constitutional Perspective

EVELYNE LAGRANGE — 25 January, 2016



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It will come as no surprise for readers familiar with Anne Peters' reflections on the international legal system to grasp from her *Jenseits der Menschenrechte* that also foreign investors are vested with rights rooted in international law

(257-307). This phenomenon is linked to a continuous process of internationalisation of legal relationships with host states. But indeed neither the very nature of that process nor that of their rights are well established in doctrinal works. While for an investor internationalisation means emancipation from both the home state – diplomatic protection being put aside – and the domestic jurisdictions of the host state – local remedies being bypassed in fact or in law –, internationalisation does not so obviously rhyme with full publicization of these relationships and the settlement of disputes they generate.

Moreover, the nature of investors' rights remains disputed: Are they proper rights of the foreign investor? If they are proper rights are they to be assimilated into human rights or do they belong to a distinct category, subject to a distinct regime? Are they enforceable in domestic legal systems despite (often) originating in international treaties? The latter question would become pivotal if states were to reintroduce the condition of exhaustion of local remedies prior to arbitration or refuse to consent to arbitration. The insertion of investors' rights protection in a national and/or (hypothetical) international/global constitutional system is ultimately at stake. To put it provocatively: Are foreign investors' rights to be protected beyond domestic constitutional systems? Is the protection by arbitral tribunals in any way comparable to the protection granted to human rights by international courts? Does a privilege of jurisdiction fit into a global constitutional system that is still a work in progress?

Departing from her previous publications on global constitutionalism – and from a divided literature on constitutionalism in the face of investor-state arbitration

(and vice versa), referred to here and there but not key to her demonstration –, Anne Peters focuses instead on the international status of private persons. Her point is much more the existence, if not of a homogeneous international status for investors, at least of a set of procedural and material rights of their own. Methodically demonstrating the consistency of these rights, she illuminates some still controversial issues and leaves others in an enduring twilight. The short comment submitted here follows her path, but reintroduces constitutionalist and publicist concerns.

### **Proper procedural rights**

Concerning an investor's right to go to arbitration, it results either from a state contract or statute alone or in combination with international instruments (and quite often from the ICSID-Convention and/or a BIT) or from the latter alone. It is, then, genuinely an international right (259, 264).

The consecration of such a procedural right in investment law was established first and early in striking contrast to international humanitarian law (258): Foreign investors were in the position to directly or indirectly negotiate access to international fora. However, considering a historical approach of this achievement, Anne Peters prefers a questioning on the legal nature of the agreement to arbitrate and favors its submission to international law, especially when backed by an international treaty (261). Yet, there remain other intriguing issues.

Some of them relate to the ICSID Convention itself: Is that treaty deemed to create proper procedural rights for foreign investors or are all procedural rights enshrined in other

instruments (BIT, domestic statute, investor-state contract)? While not hinting at states' statements supporting it, Anne Peters supports the former view (262). Suppose she is right: Is the Convention self-executing? To my knowledge, the doctrine has paid little attention to that question, but an investor could raise such an issue in a dispute with the host state brought before domestic courts to have them declare a change in the law irregular or ineffective by virtue of the trumping effect of the Convention (for instance, if a statute were deemed to retroactively repeal the consent given by the state in a previous statute or in contracts with investors, or if a statute were contradicting art. 54.1 of the ICSID Convention). Or simply, absent any statute implementing the ICSID Convention, to have domestic courts enforce an award. A swift parallel to the kind of issues raised in *Medellin v. Texas* decided by the Supreme Court of the United States on March 25, 2008 makes this question not simply speculative.

Other uncertainties come up when the ICSID Convention is not applicable. Does the statutory offer of the host state have the same value and status as an international unilateral commitment – towards a private person? Arbitral tribunals have assumed that unilateral acts may internationally commit states towards investors (ICSID, *Mobil Corporation Venezuela Holdings B.V. v. Venezuela*, June 10, 2010, n° ARB/07/27, §§ 84-85); yet, the regime of an offer made outside any treaty framework remains uncertain: Is it to be interpreted restrictively or not? (ICSID, *Tidewater inc. v. Venezuela*, n° ARB/10/5, February 8, 2013, §§ 87 ff., esp. 99 – in those cases, the unilateral act stood against an international treaty). Beyond practical incidences on the qualification of the consent to arbitration and its legal regime in such a case, the conceptual challenge is the

following: Considering the diversity of ways (with or without an arbitration clause, connected or not to a treaty) investor-state arbitration is conducted before different courts (ICSID or UNCITRAL or SCC or ICC tribunals, etc.), is it doctrinally relevant to assume that these mechanisms are all compulsory *international* modes of settlement of disputes? If they are, a first condition is met to align internationalisation of investor-state legal relationships with publicization through public international law. It is then less paradoxical – but still not persuasive – to consider investor-state arbitration as a form of global administrative law or a contribution to global constitutionalism.

For her part, Anne Peters postulates (rather than demonstrates) that investor-state arbitration has the double function of realizing private and public interests (265) and even characterizes it as typical for international actions of individuals (chapter 15, with a first point expressively titled « *Individuen als Hüter des objektiven Völkerrechts* »). The difficult question of whether this depends on the nature of the jurisdictions they turn to will be asked but not discussed here.

### **Proper material rights**

Now, the object of the dispute settled by arbitrators has to be identified. Let's turn to material rights allegedly violated.

Anne Peters seems to be equally skeptical towards the elevation of isolated state contract up to the rank of international treaties (267-271) and towards the transformation of municipal law obligations into international obligations through the umbrella clause of a BIT (271-274). She rather goes along with Alvik in writing that

« To the extent that such (investment law) standards protect interests created by contractual commitments, an investor acquires individual rights under international law by virtue of the contract » (273). This might preserve the unity of arbitral tribunals dealing with both contract and treaty claims, since they are ultimately judges of the realization of international standards: Their quality does not change with the cause – except when there is no bond between a contract and international law. A question remains open if one does not consider the quasi-monopol of arbitrators on investor-state dispute as structural or eternal: How should a domestic tribunal balance the material provisions of a contract under umbrella clause with a national statute in case of contradiction? The question of autonomy of the umbrella clause (typically : « Each party shall observe any obligation it may have entered into with regard to investments ») and its effects (direct or not) might be raised.

Still, Anne Peters mostly devotes her attention to rights simply arising from international investment treaties (274-286). In the silence of treaties on the creditors of state obligations, diverging doctrines of « direct » and « derivative rights » have been defended. Surprisingly enough, Anne Peters seems to conceptually admit that a private foreign investor should be vested with the right to go to court for the protection either of his own rights or those of the state of origin, if not for the good implementation of objective law (which here seems to overlap with the interests of states) (275 + footnote 74). The assumption that the defense of state interests and rights (finally both those of the host and home states) could be delegated to foreigners completely free to make use of their procedural rights before arbitrators they contributed to nominate seems difficult to reconcile with usual constitutional schemes or emergent global

constitutional schemes – even with an homage to French administrative law (419-421; see nuances, 305).

Scrutinizing the drafting of investment treaties, Anne Peters nonetheless approves the « direct rights » doctrine that best reflects the nature of obligations subscribed to by states. One can but agree with her that viewing the ICSID system as a kind of « institutionalisation of diplomatic protection » or a « reversed » diplomatic protection is nonsense (279). Still, it remains to be explored why such a (mis)conception could be upheld for so long or debated so seriously. One result was that the eviction of domestic courts could not be constitutionally questioned for long. Be that as it may, investors were denied any right to diplomatic protection; as an advantageous compensation, it was endorsed that they were endowed with the procedural right to bring demands in their own name to arbitral tribunals, in brief: First with procedural rights and eventually with material ones too.

Here, Anne Peters makes three important submissions. *First*, this did not occur through mechanisms analogous to « contracts without privity » (the analogies with private law institutions are rebutted) but through law-making treaties (the analogy with statutes is privileged) (281-282).

*Second*, it could and should be presumed (not irrefutably) that investment treaty provisions create direct rights for private persons (286).

*Third*, such a presumption entails a dynamics in the construction of investment treaties (287). Should the treaty bestow rights on investors, then it should be construed according to legitimate expectations of investors. This is perhaps going a step too far. Either this should be true of

any provision or treaty creating rights for private persons, or this should be justified in the light of analogies sometimes (imprudently) suggested with human rights treaties. The former would certainly be an overstatement with regard to current international law. The latter brings us back to the good use of analogies: Investors' rights may overlap with human rights; it is not to say they have the same nature (on criteria of distinction: chapter 14; for further discussion: S. Cuendet (ed.), *Le droit des investissements étrangers : approche globale*, Larcier, forthcoming, 2016).

Last but not least, the practical consequences of the reading proposed by Anne Peters – exclusion from terms of reference of statements made by states during a proceedings (287), dynamic interpretation (287-288), possible survival of the convention guarantees even in case of consensual termination (288-289)... –, result in constitutionalizing investment treaties (in the trivial sense that they are deprived of any element of flexibility decades long). Still, they are enforced most of the time by investor-state tribunals. All in all, this amounts to entrusting a constitution to private hands. The author herself steps back and advocates with sensible political agreements that states should not be barred from adopting counter-measures at the cost of investors protected by a BIT (see nuances, 292-295).

### **Proper secondary rights**

Conceptually admitting some possible discrepancies between holding primary rights and secondary rights (i.e., here a right to pecuniary compensation for losses inflicted on the investor), Anne Peters assumes that the investor is in law the true holder of secondary rights (301) as provided for



by the law of international state responsibility. This point was much debated in doctrine and was left unresolved by the ILC's Articles on State Responsibility (2001, art. 33). Anne Peters agrees with James Crawford's comment on the said Articles by cautiously asserting the ultimate consequences of previous assumptions and drawing support from arbitral practice.

Perhaps she could have gone several steps beyond. *First*, isn't it fairly consistent with general principles of law that the holder of a material right, here the investor, be the holder of the right to remedies (from access to a court up to repair) – unless the contracting states reserved their right to dispose of his secondary rights?

*Second*, it is crucial to assess whether « the liability created by this sub-system of international responsibility is (...) more adequately described as having a transnational commercial nature in view of the commercial interests at the heart of the dispute » (to borrow from the terms of Z. Douglas, cited, 297, footnote 163) – or not. The construction of such provisions as articles 42 and 54.1 of the ICSID Convention or article 1135-1 of NAFTA is key. The compensation is certainly due to the claimant (the investor). Yet, did state parties intend to partially depart from the law of state responsibility by depriving investors of their right to other forms of *restitutio in integrum* or to substitute that regime with commercial compensation (see also chapter 6)? If the latter were the case, investor-state arbitration could not be described as a mechanism of settlement of (true) international disputes, and even less as an alternative mode of judicial review of domestic statutes, regulations, and decisions. What is more, this qualification could impact the

way constitutional courts should appreciate the delegation of power from domestic courts to arbitral tribunals.

The quest for the legal status of private persons in the international system is inextricably linked to the reshaping of national constitutional systems. This status can be warranted beyond the state but, given the public interests at stake – so conspicuous in investment matters –, not as a disavowal of the most basic requirements of (national) constitutional law or without any review of its compatibility with national constitutional rules. In a word – notwithstanding minor or major disagreements expressed here and there: Anne Peters' magistral publication validates her intuition that constitutionalism is a relevant approach to contemporary international law.

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